News 27.06.2023

Belgium adopts its system for filtering foreign direct investment: what consequences can be expected?

Belgium is at the center of Europe. Thanks to its strategic geographical location and the presence of major institutions and infrastructure (EU, port of Antwerp, etc.), it has always attracted foreign investors.

A country's attractiveness to foreign capital is obviously positive. However, it must be regulated when it leads to an uncontrolled influx of investment, potentially undermining the country's control over certain essential sectors.

This is the reasoning behind the adoption of rules on foreign direct investment ("FDI").

The challenge of these regulations is to find a successful balance by controlling foreign investment that may present a "risk" for our country, particularly when it concerns certain sensitive sectors, while at the same time not discouraging potential investors.

1. The storm

The European Union is launching hostilities by adopting Regulation (EU) 2019/452 establishing a framework for screening foreign direct investment in the Union (the "Regulation", O.J. 21 March 2019, p. 79).

As its name suggests, the Regulation, which has been applicable since 11 October 2020, defines a framework for the filtering mechanisms adopted by the Member States.

Belgium is following in the footsteps of the European legislator with the cooperation agreement of

30 November 2022 aimed at establishing a mechanism for filtering foreign direct investment (the " Cooperation Agreement").

The aim is clear: to give ourselves the means to monitor investments that fall within the scope of the regulations and, if necessary, to prevent them from taking place.

What are the key features of the Cooperation Agreement?

1.1. General definition of FDI and "foreign investor": what type of investment and by whom?

Article 2, 3° gives a preliminary definition of what is covered by the concept of FDI: "an investment of any kind made by a foreign investor with the aim of establishing or maintaining lasting and direct relations between the foreign investor and the entrepreneur or enterprise, including investments allowing effective participation in the management or control of that enterprise".

The definition is very general and wide at this stage.

The foreign investor in question is defined as follows (article 2, 4°):

- any individual whose main residence is outside the European Union;
- any non-EU company incorporated or otherwise organized in accordance with the law of a non-EU country and having its registered office or principal place of business in a country outside the EU; or
- any company where one of the UBOs has its main residence outside the EU;

including, but not limited to, public authorities, public institutions, public companies and private companies and institutions wishing to acquire control of an entity established in Belgium or whose head office is established in Belgium.

1.2. Concrete scope of application: which investments?

Article 4 of the Cooperation Agreement also specifies that it covers foreign direct investment that may have an impact on security or public order in Belgium, as provided for in the Regulations, or on the strategic interests of the federated entities.

There are two types:

- On the one hand, investments that give rise, directly or indirectly, to the acquisition of at least 10% of the voting rights in companies established in Belgium and whose activities are linked to the sectors of defence, including dual-use products, energy, cybersecurity, electronic communications or digital infrastructures, and whose annual turnover during the financial year preceding the acquisition of at least 10% of the voting rights were in excess of €100 million;

- On the other hand, investments which result, directly or indirectly, in the acquisition of at least 25% of the voting rights in companies or entities established in Belgium, whose turnover during the financial year preceding the acquisition of at least 25% of the voting rights is greater than 25 million euros and whose activities relate to certain specific sectors defined in Article 4, §2, 2° of the Cooperation Agreement, in particular :

o Critical infrastructure in certain defined sectors ;

o Essential technologies and raw materials for certain defined sectors;

o The supply of essential inputs like energy, raw materials and food chain safety ;

o The access to sensitive information ;

o The private security sector ;

o Media freedom and pluralism

o And so on.

1.3. Creation of the ISC

The Cooperation Agreement (article 3) creates the Interfederal Screening Committee, which is responsible for its application. It is made up of representatives of the Federal State and the various

federated entities.

1.4. Exclusion

Interestingly, investments aimed at creating new economic activities (green field) are excluded from the scope of the Cooperation Agreement (article 4, §4).

This exclusion seems logical insofar as, as stated above, the idea is not to discourage foreign investors or innovation in new sectors.

1.5. Procedure

What procedure should be followed when a proposed transaction falls within the scope of FDI regulations?

Notification (articles 5 and 6)

After the agreement has been concluded and before the offer to purchase or exchange shares or the acquisition of a controlling interest has been published, the foreign investor must send a notification to the ISC secretariat.

It is also possible to notify a draft agreement.

The regulations apply to listed companies, and the proposed transaction must be suspended for the duration of any verification and screening procedures.

Verification procedure (article 17)

Once it has received the complete file, the ISC verifies the information and determines, in particular, whether the planned transaction is likely to undermine public order, national security or strategic interests.

Decision of the ISC (article 18)

The decision to conclude the verification procedure favorably is notified to the parties no later than thirty days following receipt of the complete file by the ISC secretariat.

If the ISC decides to initiate a screening procedure, it will inform the parties and the European

authorities in accordance with the Regulation.

Possible screening procedure and opinion/report (Articles 19 and 20)

The screening procedure is based on the conclusions of the verification procedure.

It is only initiated in the event of a negative decision by the ISC at the end of the verification procedure.

In this sense, it constitutes an additional stage in the control of the admissibility of an FDI.

An opinion and a report are drawn up by the ISC at the end of the screening procedure.

Corrective measures (article 21)

The Cooperation Agreement provides for the possibility, in order to arrive at a positive opinion at the end of a screening procedure and in the event of a draft negative opinion, of taking corrective measures "which reduce the possible impact on public order and national security, on the one hand, or on strategic interests, on the other hand, to a level acceptable for obtaining a positive decision".

1.6. Penalties

Article 28 of the Cooperation Agreement provides that an administrative fine of up to 10% of the investment concerned may be imposed in the event of failure to comply with the Regulations.

1.7. Recourse

An appeal (without suspensive effect) may be lodged against the final decision on eligibility or non-eligibility with the Markets Court (article 29 of the Cooperation Agreement).

1.8. Entry into force

The text thus adopted has been submitted to the parliaments of the various federated entities and should come into force on 1er July 2023.

2. The teacup ?

At first glance, the regime introduced by Belgium may seem draconian and likely to have a major impact on the market.

However, the federal administration estimates (figures relayed in the newspaper l'Echo on 30 November 2022) :

- The number of files submitted to the verification phase is set at 70-80 per year;
- The number of applications going through the screening phase is set at 3-5 per year;
- That a problematic case could be encountered every 2-3 years (mainly cases involving foreign powers).

The potential impact of the regulations therefore needs to be put into perspective.

What practical implications can we expect, particularly on the mergers and acquisitions market?

There are three main types:

- Timing of transactions: deals must be put on standby while awaiting the green light from the ISC;
- Market slowdown: the introduction of FDI screening mechanisms has led to a reduction in the number of deals in the USA (68%) and France (40%), for companies subject to screening mechanisms;
- Listed companies: some see FDI screening mechanisms as additional anti-takeover protection for listed companies. There is therefore a risk that the management of these companies will become more complacent.

3. Conclusion

It is obviously too early to draw conclusions when the regulations presented have not yet come into force: the rules will have to be examined in the light of practical experience.

However, given the above figures, we can assume that the impact will remain limited in terms of overall trading volume. On the other hand, it will obviously be greater for transactions subject to

regulation.

At European level, the Regulation (article 15) provides for the rules to be monitored every 5 years, with an initial assessment before 12 October 2023: it will be interesting to examine the report produced in this context, particularly with regard to the application of the rules adopted by the other Member States.

There is no doubt that the Belgian legal doctrine will take stock of the application of domestic FDI regulations when the time comes.

To take things a step further, it is also worth keeping an eye on another regulation, which comes into force almost simultaneously (12 July 2023): the Foreign Subsidies Regime. As the name suggests, these rules cover subsidies granted by non-EU countries to companies operating in the EU. The aim is to extend the net of the state aid regime, which only covers aid granted by Member States to "their" companies, while subsidies received by companies operating in the EU from non-EU countries are not currently regulated.

Ultimately, the FDI and FSR mechanisms are part of a general trend that is seeing the scope of due diligence for mergers and acquisitions explode.

Mechelsesteenweg 127A, b1 - 2018 Antwerp
t. +32 3 260 98 60 | +32 2 790 44 44
Regentschapsstraat 58 PO box 8 - 1000 Brussels
info@schoups.be
www.schoups.com